BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIO CORDERO	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,061,605
OMEGA DRYWALL COMPANY	)	
NEIGHBORS CONSTRUCTION COMPANY	)	
Respondents	)	
AND	)	
	)	
INSURANCE COMPANY UNKNOWN[1]	)	
EMPLOYERS MUTUAL CASUALTY COMPANY	)	
Insurance Carriers	)	

ORDER

Respondents Omega Drywall Company (Omega) and Neighbors Construction Company (Neighbors) request review of the August 23, 2012, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

APPEARANCES

C. Albert Herdoiza, of Kansas City, Missouri, appeared for the claimant. Daniel L. Doyle, of Kansas City, Kansas, appeared for respondent, Neighbors and its insurance carrier. Denise E. Tomasic, of Kansas City, Kansas, appeared for Omega.

RECORD AND STIPULATIONS

The record consists of the transcript of the August 22, 2012, preliminary hearing and the exhibits attached, along with the documents of record filed with the Division.

[1] Omega is a company out of Texas. It has workers compensation insurance, but it does not cover injuries that occur outside of Texas.

ISSUES

The ALJ found claimant to be an employee of Omega and ordered Neighbors, as the general contractor for the uninsured subcontractor Omega, to pay claimant's medical expenses to date and any additional medical treatment for the injury, with E. Bruce Toby, M.D., the authorized treating physician. Neighbors was also ordered to pay temporary total disability compensation at the rate of $400 per week from July 5, 2012 until claimant is released to work without restrictions, is accommodated or is found to be at maximum medical improvement.

Both Omega and Neighbors argue that claimant is not entitled to any compensation because he was an independent contractor and that there was no employer/employee relationship. They also argue that claimant failed to give timely notice of an on-the-job injury. Therefore both Omega and Neighbors contend the ALJ's Order should be reversed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

It was stipulated that Omega was a subcontractor for Neighbors.[2] Claimant testified that he began working for respondent Omega after going to a construction site in Overland Park, having heard workers were needed.[3] He testified to speaking with a man named Emilio[4] about a job. Emilio worked for Omega at the time. Claimant testified that when he was hired, he and Emilio agreed that he would work 7:00 a.m. to 5:00 p.m., Monday through Saturday, at $100 day. Claimant was hired to clean up the trash and sheetrock from the site. Claimant used shovels, brooms, scrapers and a forklift to get the job done. Claimant was instructed by Emilio where to work and was told by Emilio if anything needed to be redone or if he did not do the work correctly. Claimant testified that he believed Emilio was in charge of hiring and firing him. Claimant was paid by check and was provided with the tools and equipment necessary to perform the job.[5]

Claimant came to the United States in 2010. The jobs that he worked in 2011 paid him in cash. Claimant's primary language is Spanish. He does not speak any English.

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[2] P.H. Trans. at 34.

[3] *Id.* at 7.

[4] Claimant did not know Emilio's last name. When Edward Ortega testified he identified Emilio as Emilio Rodriguez, a former employee of Omega. (P.H. Trans. at 87).

[5] P.H. Trans. at 9.

Claimant has never been a subcontractor or owned a company and was never told by Emilio that he was a subcontractor.[6] Claimant considered himself an employee of Omega.

Claimant was asked by Emilio to sign some paperwork in order to get his paycheck in his name. He does not know what the paperwork said because it was in English. He was not told that if he signed the paperwork he would be considered an independent contractor. Claimant testified that the had been working at the construction site for 15 days before he was asked to sign the paperwork.[7]

Claimant testified that others were hired after him and sometimes respondent would add additional amounts to his check so he could pay people who had only been working for a day or two.[8] This was done because claimant would on occasion bring people in who wanted to work two or three days and Emilio didn't want to do the extra paperwork to pay the workers separately for only a few days work.

On May 18, 2012, claimant fell on the job and injured his right hand. Claimant testified that he was operating a forklift on the fourth floor when he stopped to throw some trash away and on his way back to the forklift, fell on the stairs hitting his right hand. At first he thought his hand was just bruised.

Claimant reported the injury to Emilio, who looked at the hand and said it was nothing more than a bruise. Claimant testified that he was told if he went home early he would only be paid for half a day, so he worked the rest of the day.[9] The next day, claimant's hand was worse. He called in and told Emilio about his hand and asked for the day off. Claimant was told that he could work or not work, but if he didn't work he would not get paid, so claimant came in, but was only able to work half a day. When claimant returned to work he asked for medical treatment and was turned down. Claimant tried to work, but the pain was too much and he again asked for medical treatment. This time Emilio told claimant that he wasn't going to receive any treatment because he had signed a paper stating that he was a subcontractor and respondent would not be responsible if he had an accident.[10] Claimant was told that the paper he signs every time he gets his check says that he is a subcontractor. This was not claimant's understanding of what the paper meant.

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[6] *Id.* at 12.

[7] *Id.* at 15.

[8] *Id.* at 17.

[9] *Id.* at 23.

[10] *Id.* at 25.

Claimant testified that his co-workers were aware of claimant's accident and he also told a supervisor from Neighbors named Ilario about the accident. While claimant worked for respondent he did not work for anyone else because he didn't have any tools or a truck, and because he can't speak English.

Claimant sought medical treatment on his own with Dr. Andres, a chiropractor, on May 26, 2012, eight days after the accident. The history provided to Dr. Andres detailed claimant's fall at work. Claimant testified that Dr. Andres told him his injury would heal in four to six weeks if he used a brace. Beyond prescribing the brace, Dr. Andres was unable to help claimant. Claimant bought the brace at the pharmacy. He reported Dr. Andres' finding to Emilio and was told to continue to work. Claimant worked until June 15, 2012, when he was told that he was no longer needed. Claimant testified that he hadn't reported his accident to Mr. Ortega, the owner of Omega, because he wanted to see a specialist first and because he was afraid he would lose his job.

After claimant's work with Omega was over he found work painting at the same construction site. He performed that job until June 30, 2012, when he was no longer needed. Claimant testified the painting job hurt his hands too much, so it is doubtful he would have continued that job for long anyway. Claimant has not worked since this painting job because the doctor told him his hand would heal if he stopped using it for three weeks. Claimant was not given a note taking him off work.

Claimant was examined by orthopedic surgeon Kevin McCarthy, M.D., on July 5, 2012. The history of injury provided to Dr. McCarthy is consistent. Claimant displayed a prominence over the dorsal aspect of the right CMC joint. X-rays showed an evulsion fracture of the proximal aspect of the fifth metacarpal. Claimant's hand was put in a cast for three weeks. The cast came off, but it hadn't healed. He was put in another cast for another three weeks, after which his hand still had not healed.

Claimant returned to Dr. McCarthy on July 26, 2012, with continued pain and throbbing in the right hand. He did report some improvement. A CT scan of the hand was ordered and claimant was referred to orthopedic surgeon E. Bruce Toby, M.D., of the same office. The CT scan showed displacement and disruption of the fourth and possibly fifth CMC joints on the right hand. Claimant met with Dr. Toby on August 15, 2012, at which time he was told that surgery was needed to treat his hand. Dr. Toby recommended the insertion of pins in the hand and a fusion of the fourth and fifth CMC joints.

Edward Ortega, vice president of construction for Omega, testified that Omega is a multi-family, residential drywall subcontractor. The company has offices in Texas and has workers compensation insurance, but it only covers injuries that occur in Texas.[11] Mr. Ortega testified that Omega would contract with Neighbors to perform drywall work in

[11] *Id.* at 68.

Kansas, and then Omega would hire subcontractors to perform the work. These arrangements are made several months to a year in advance.

Mr. Ortega acknowledged that he was to show proof of workers compensation insurance coverage in Kansas to Neighbors before the work was started. Although, there was no Kansas coverage, he was under the impression that proof had been submitted to Neighbors by the insurance agent.[12]

Mr. Ortega was in daily contact with his on the job coordinators, Emilio and George. He testified that the subcontractors supplied their own tools and used their own methods to complete the job.[13] They also worked on their own schedules. He testified that the subcontractors would submit verbal bids to get the chance to work on a job. The subcontractors were paid by the square foot and no taxes or insurance were withheld from their pay. They were provided 1099s. Mr. Ortega testified that subcontractors working with Omega are free to work for other contractors.

It was Mr. Ortega's understanding that claimant was working on site for another subcontractor and that subcontractor was completing its portion of the construction job. Claimant asked one of Mr. Ortega's personnel (Emilio or George) if he could subcontract some cleanup. Mr. Ortega testified that Emilio and George were under clear instructions as to what they were to tell subcontractors who wanted to engage in a particular piece of work on any job and how the subs would be paid for the work.[14]

Mr. Ortega understood claimant to be a subcontractor. He testified claimant was free to use his own judgment on the job and was free to hire helpers to aid him in his work. Mr. Ortega understood that claimant had his own transportation and he was free to come and go as he wanted.

Mr. Ortega met with claimant and the other subcontractors in mid-June to pay them for their work and let them know the job was coming to an end, and their work was appreciated. At that time, Mr. Ortega did not notice claimant wearing a splint or a brace, and he was not aware the claimant had been injured on the job or that claimant was allegedly complaining of problems with his right hand. Mr. Ortega first learned of claimant's injury when he received notification from Mr. Doyle, the Attorney for Neighbors.

Mr. Ortega acknowledged the company has no bilingual paperwork for those workers who do not speak English. He has no direct knowledge of whether anyone

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[12] *Id.* at 82-84.

[13] *Id.* at 70-71.

[14] *Id.* at 72.

explained the work agreement with claimant.[15] He testified that Emilio Rodriguez would know the terms of claimant's employment since Emilio hired claimant.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[16]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[17]

The ALJ determined that claimant was an employee of Omega and not an independent contractor. However, as noted by the ALJ, it is not an easy question to answer in this situation.

The Kansas Supreme Court, in *McCubbin*[18], acknowledged there is no precise definition which can be applied in determining whether a person is an employee or an independent contractor. However, citing *Falls*[19], the Court in *McCubbin* stated: "An independent contractor is defined as one who, in exercising an independent employment, contracts to do certain work according to his own methods, without being subject to the control of his employer, except as to the results or product of his work".[20] The Court acknowledged that each case turns upon the facts particular to that case. However, the Court also stated that the primary determination as to an employee relationship is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. The Court, again citing *Falls*, stated: "It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor."[21]

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[15] *Id.* at 86.

[16] K.S.A. 2011 Supp. 501b and K.S.A. 2011 Supp. 44-508(h).

[17] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[18] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

[19] *Falls v. Scott*, 249 Kan. 54, 815 P2d 1104 (1991).

[20] *McCubbin v. Walker*, 256 Kan. 280.

[21] *McCubbin v. Walker*, 256 Kan. 281.

Several other factors have been recognized as pertinent in determining whether a worker is an employee or an independent contractor. Those factors include:

1) the existence of a contract to perform a certain piece of work at a fixed price,
2) the independent nature of the worker's business or distinct calling,
3) the employment of assistants and the right to supervise their activities,
4) the worker's obligation to furnish tools, supplies, and materials,
5) the worker's right to control the progress of the work,
6) the length of time the worker is employed,
7) whether the worker is paid by time or by the job,
8) whether the work is part of the regular business of the employer.[22]

Claimant testified that Emilio had the right to tell him what work to do, when and where to do it, and if the work is not done properly, to do it again. Additionally, Omega furnished all of the tools and supplies. This Board Member acknowledges that the work was at a fixed price, was temporary and claimant was paid by the day. But, the most significant factor in an employer/employee relationship is still the right to control. Here, Emilio had the right to control almost every aspect of claimant's work for Omega. This Board Member agrees that claimant was an employee of respondent Omega. Respondent's argument that claimant is bound by the papers he signed each time he picked up his check is not persuasive. Claimant neither spoke nor read English. He cannot be bound by a document he does not understand and which was not explained to him. The Order of the ALJ on this issue is affirmed.

K.S.A. 2011 Supp. 44-520 states:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
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> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.

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[22] *Musalek v Nationwide Mobile Homes*, No. 247,878, 2000 WL 623092 (Kan. WCAB Apr. 25, 2000).

> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Both respondents raise the timeliness of claimant's notice of accident as a defense. However, claimant testified regarding the conversations he had about the accident with both Emilio, as supervisor or Omega, and with Ilario, a supervisor for Neighbors. This testimony is uncontradicted, even by Mr. Ortega. Neither Emilio nor Neighbors' supervisor testified in this matter. And Mr. Ortega was unable to testify regarding the conversations between claimant and Emilio and Ilario. This Board Member finds that claimant provided timely notice of this accident.

K.S.A. 2011 Supp. 44-503 states:

> (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall

be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

(b) Where the principal is liable to pay compensation under this section, the principal shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of this section, and shall have a cause of action under the workers compensation act for indemnification.

(c) Nothing in this section shall be construed as preventing a worker from recovering compensation under the workers compensation act from the contractor instead of the principal.

(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under the principal's control or management, or on, in or about the execution of such work under the principal's control or management.

(e) A principal contractor, when sued by a worker of a subcontractor, shall have the right to implead the subcontractor.

(f) The principal contractor who pays compensation to a worker of a subcontractor shall have the right to recover over against the subcontractor in the action under the workers compensation act if the subcontractor has been impleaded.

(g) Notwithstanding any other provision of this section, in any case where the contractor (1) is an employer who employs employees in an employment to which the act is applicable, or has filed a written statement of election with the director to accept the provisions of the workers compensation act pursuant to subsection (b) of K.S.A. 44-505, and amendments thereto, to the extent of such election, and (2) has secured the payment of compensation as required by K.S.A. 44-532, and amendments thereto, for all persons for whom the contractor is required to or elects to secure such compensation, as evidenced by a current certificate of workers compensation insurance, by a certification from the director that the contractor is currently qualified as a self-insurer under that statute, or by a certification from the commissioner of insurance that the contractor is maintaining a membership in a qualified group-funded workers compensation pool, then, the principal shall not be liable for any compensation under this or any other section of the workers compensation act for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall have no right to file a claim against or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act. In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation. No insurance company shall charge a principal a

> premium for workers compensation insurance for any liability for which the contractor has secured the payment of compensation.

Omega did not have workers compensation insurance for accidents occurring in Kansas. Additionally, Omega was a subcontractor for Neighbors. Therefore, the responsibility for this injury falls on Neighbors, as the general contractor. The award by the ALJ against Neighbors is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[23] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant was an employee of respondent Omega on the date of the accident and provided timely notice of the work-related accident suffered on May 18, 2012. As Omega was uninsured on the date of accident, Neighbors, as the general contractor, is responsible for the workers compensation benefits for Omega's employee. The Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated August 23, 2012, is affirmed.

[23] K.S.A. 2011 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge